Supreme Court, U.S.
FILED
APR 8 2002

(3)

No. 01-1204

IN THE

Supreme Court of the United States

LAWRENCE EPSTEIN and JOHN LINDER,

Petitioners,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

PETITIONERS' REPLY BRIEF

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I.

The MCA directors' brief in opposition ("MCA brief") and also the letters of Matsushita and the Delaware plaintiffs essentially claim that the petition presents "fact-intensive contentions" and "raises no issue of constitutional law" (Matsushita letter dated March 21, 2002).

In truth, there are no disputed issues of fact, and Delaware squarely decided the federal questions petitioners put before them. The absence of disputed facts is apparent from the decision appealed from. Delaware's Supreme Court acknowledged that "unfortunately, the Vice Chancellor did not make an explicit determination, based upon any record evidence, that the plaintiffs were adequate representatives of the class" (19a). The Delaware court thus acknowledged that there was no record evidence of standing, and no record evidence of representational adequacy.

There are no disputed facts because the court below conceded that the record was utterly barren of evidence from which adequacy of representation could be inferred. The Delaware Supreme Court also explicitly ruled that no one had previously "litigate[d] the adequacy of their representation" (19a).

The Delaware court went on to hold, and this is essentially what merits attention of this Court, that the failure to have a record-based finding on standing or adequacy of representation did not matter. Why? Because the lower Delaware courts had not made any findings from which the representatives' *inadequacy* could be inferred.

The Delaware Supreme Court thus attempted to solve the insurmountable failure of record evidence by turning record making duties upside down. It presumed that there would have

been an adequate record, imposing a duty on objectors to show that, had a record been made, it would not have been sufficient.

> "In the present case, there were no findings by the trial court from which it could be inferred that the plaintiffs were inadequate representatives" (20a).

The absence of findings could be glossed over, said Delaware, because both the chancery court and the state plaintiffs' class counsel were experienced in class action matters (20a and n.12, 24a).

This Court has been clear that the constitution requires that a representative plaintiff's adequacy to serve as a class representative must be proved, not presumed.[1] *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982) ("actual, not presumed conformance with Rule 23(a) remains . . . indispensable"). In *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), the Chief Justice's opinion upholding state courts' power to determine national class actions rested on the vital role the supervising judge plays in assuring fairness to absent class member. That role cannot be played, and the underlying constitutional predicate cannot be discharged, if a court is allowed to make the constitutionally necessary finding without a scintilla of evidence in the record to support it. As a constitutional matter, a state court cannot shift the burden of proof for making the record to those who oppose certification.

It is settled that a representative record founded on inference collides with constitutional authority (see cases collected at Pet. Br. 15-16, and *General Telephone Co. of Southwest, supra* at 160). And make no mistake because MCA

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[1] Thus, respondents' suggestion that this case involves the application of a new constitutional mandate is unsound.

has implied that there is record evidence and findings based on that record (MCA Br. at 2). As noted, Delaware's Supreme Court explicitly confirmed a lack of findings based on record evidence (19a).

MCA concedes (MCA Br. at 2) the presence of the federal question when it writes, "The Delaware Supreme Court did not 'dispense' with the adequacy of representation requirement but . . . upon a careful review of the record, *found it satisfied*" (emphasis added). Adequacy of representation is a constitutional requirement in class action litigation. *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 794 (1996). To say the court "found it satisfied" means that the court below decided the federal question of whether the adequate representation requirement had been satisfied, and did so even though the court specifically determined that, in certifying the settlement class, "the Vice Chancellor did not make an explicit determination, based upon any record evidence, that the plaintiffs were adequate representatives of the class" (19a).

And so, the constitutional questions are: (a) whether a state court may constitutionally certify a class without *any* record evidence that the representatives are class members and thus had standing, or that if they had standing, they were adequate, and (b) whether such evidence might be inferred because a conflicted counsel and the court each were experienced in the field.

And also, this case is a vehicle for the Court to make plain the minimum procedural requirement for state courts exercising class action jurisdiction. If state judicial supervision is perceived to be lax, the only practicable alternative is to make all class actions removable to federal courts imposing new and heavy burdens on an overloaded system.

II.

Respondents assert (MCA Br. at 2, 12) that this matter comes to the court for a review of a record, or of abuse of discretion. That is wrong. The question of whether correct constitutional standards were improperly applied to a starkly naked evidentiary record is a pure legal issue. *See, Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 n.31 (1999). The same is true of Delaware's plainly unsound holding that opt-out rights represent material constitutionally fungible with adequate representation (21a). No respondent contests this constitutional failure.

None of what else appears in the MCA brief does anything to diminish the cert. worthy weight of whether other people's rights can be so expensively destroyed with no record evidence. It is important to understand the extent to which a court can satisfy this constitutional provision in the acknowledged reality of no record evidence of standing or of adequacy. It bears on all class and other representational proceedings.

MCA claims (Br. at 15) that Delaware law of the case cannot now be challenged in this Court. This contention at once ignores that: (a) Delaware cannot dispense with constitutional provision, and (b) quoting Delaware itself, Delaware did *not* previously "make an explicit determination, based upon any record evidence, that the plaintiffs were adequate representatives of the class", and no-one previously had litigated adequacy of representation (19a).

The assertion (MCA Br. at 17) that *Epstein III*[2] collaterally estopped these proceedings is not true. This Court's

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[2] *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999).

decision in *Matsushita* expressly *declined* to address adequacy, 516 U.S. at 379 n.5, and the Ninth Circuit made clear that the question of satisfactory adequacy was to be resolved within the state system first.[3] Indeed, the *Matsushita* Court correctly reported that Matsushita itself recommended that relief from judgment be sought first in Delaware, 516 U.S at 890 n.11,[4] and Delaware has since recognized that before now the matter of adequacy of representation had not been litigated expressly (18a-19a).

When this Court decided *Matsushita v. Epstein*, 516 U.S. 378 (1996), it operated on the assumption that the Delaware courts had acted "pursuant to the requirements of Delaware Rule of Chancery 23 and the Due Process Clause." 516 U.S. at 382. Delaware has now told us - and there is no factual controversy about this whatsoever - that its "findings" were without any record evidence. That is procedurally unconscionable; and to permit self-interested lawyers' experience to substitute for judicial supervision is substantively impermissible gloss on adequate representation.

Finally, the Delaware court explicitly ruled that no one previously had "litigate[d] the adequacy of their representation." (19a) Thus, there is no genuine way to contest that this Court has not addressed in this case the issue of whether a

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[3] The Ninth Circuit found that "[t]he absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court". 179 F.3d 641, 648 (App. 129a).

[4] In a partial concurrence, three members of this Court stated "Counsel for Matsushita acknowledged that relief from a judgment may be sought in Delaware pursuant to that state's counterpart to Federal Rule of Civil Procedure 60(b). *See* Tr. of Oral Arg. 51-52". *Id.*

representative may be constitutionally adequate with no record evidence of standing or of adequacy.

The claim (MCA Br. at 17) that an earlier denial of *cert.* was of legal moment is frivolous.

> "[T]he 'denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.' *United States v. Carver*, 260 U.S. 482, 490, 43 S.Ct. 181, 182, 67 L.Ed. 361 (1923)." *Missouri v. Jenkins*, 515 U.S. 70, 85, 115 S.Ct. 2033, 2047 (1995) (Rehnquist, C.J.)

Claims of procedural untimeliness and the alleged erroneous factual premise of petitioners' complaint (MCA Br. at 20-21) are, at best, bizarre. Delaware was master of whether petitioners' Delaware initiatives were timely, and it did not preclude petitioners for want of timeliness (2a). The assertion that the Delaware complaint satisfies standing is wrong.[5] Complaints are not record evidence. 179 F.3d at 653-54 (J. Thomas, *dissenting*). *See also Miller v. United States*, 150 F.3d 770, 772 (7th Cir. 1998) ("a complaint, . . . no matter how detailed, is not evidence"). If they were, Delaware would not have found it unfortunate no findings of adequacy were made and might have attempted to have made them from the complaint. Respondents' dependence on a complaint for proof of record evidence does however reinforce what is not disputed by Delaware: absence of record evidence on the constitutionally

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[5] The complaint was not verified. Even accepting the complaint's allegations as true, it did not allege that the Delaware plaintiffs *tendered* their shares or contain a formal allegation that they would adequately represent the class. The Delaware plaintiffs' allegations in the complaint were insufficient even to make them members of the subclass who once possessed federal claims.

essential elements of standing and adequacy. The only questions are those of constitutional law. They warrant the intervention of this Court.

CONCLUSION

The petition should be granted.

Dated: April 2, 2002

Respectfully submitted,

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